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Don't Worry, I'll Be Right Back: Temporary Absences of Counsel During Criminal Trials and the Rule of Automatic Reversal

David A. Moran
Wayne State University Law School.

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I. INTRODUCTION

When the victim testified during Pamela Green's trial for kidnapping and gross sexual imposition, Green's lawyer, John Carlin, never

* Associate Dean, Wayne State University Law School. B.S. 1984, with highest distinction, University of Michigan; B.A./M.A./C.A.S 1986, Cambridge University; M.S. 1988, Cornell University; J.D. 1991, *magna cum laude*, University of Michigan. I gratefully acknowledge the helpful suggestions of many of my colleagues at Wayne State, particularly Peter Henning, Tony Dillof, and Jonathan Weinberg.

asked her a single question.[1] In fact, it would have been impossible for Carlin to cross-examine the victim because he had left the courtroom to attend a hearing for a client in another case.[2] After Green repeatedly complained about Carlin's absence and asked the judge to provide her with another attorney who might actually stay in the courtroom while the prosecution's principal witnesses testified, the judge not only rejected the request but also revoked Green's bond and remanded her to jail for the remainder of the trial.[3] Not surprisingly, Green was convicted.[4]

As the jury went out to deliberate David Hudson's fate at the conclusion of his first-degree murder trial, his attorney, Stuart Young, left to attend to another case after telling the judge to respond as he saw fit to any questions the jury might have.[5] Not long after Young's departure, the jury asked the judge to explain the concept of aiding and abetting and to define the difference between first- and second-degree murder.[6] The judge responded by re-reading some of the murder instructions previously given and by reading a definition of aiding and abetting that the judge had read earlier for one of the other charges against Hudson.[7] Since Young was not present for this re-instruction of the jury, there were no objections. The jury convicted Hudson of first-degree murder the next day.[8]

These two cases bear an obvious similarity: the attorneys for both Pamela Green and David Hudson were absent during portions of their criminal trials in clear violation of the bedrock Sixth Amendment[9] rule that a criminal defendant has the right to have the assistance of counsel throughout the entire trial.

When these two cases reached the Sixth Circuit on habeas corpus review sixteen years apart, however, the court applied two very different rules of decision. In *Green*, the court held that the temporary absence of her attorney automatically required a new trial regardless of whether Green had been harmed by the temporary absence of counsel.[10] In so holding, the court applied the Supreme Court's decision in *United States v. Cronic*,[11] in which the Court endorsed a rule of "uni-

1. Green v. Arn, 809 F.2d 1257, 1259 (6th Cir.), *vacated on other grounds*, 484 U.S. 806 (1987), *opinion reinstated*, 839 F.2d 300 (6th Cir. 1988).
2. *Id.* at 1259–60.
3. *Id.* at 1260–61.
4. *Id.* at 1257.
5. Hudson v. James, 351 F.3d 212, 213–14 (6th Cir. 2003).
6. *Id.* at 214.
7. *Id.*
8. *Id.*
9. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
10. Green v. Arn, 809 F.2d 1257, 1262–64 (6th Cir. 1987).
11. 466 U.S 648, 659 & n.25 (1984).

formly" reversing a conviction without requiring a showing of prejudice when counsel was absent from a critical stage of the trial.[12] In *Hudson*, by contrast, the same Sixth Circuit concluded that *Cronic* did not apply, and that Hudson was not entitled to a new trial because he had failed to demonstrate exactly how the temporary absence of his attorney during the trial had harmed him.[13]

Cases such as *Hudson* and *Green* in which defense attorneys are temporarily absent from a criminal trial are, unfortunately, not terribly unusual. These temporary-absence cases have recently produced a significant split of authority, as exemplified by the Sixth Circuit's apparently inconsistent decisions in *Green* and *Hudson,* as to whether the defendant whose lawyer is temporarily absent must show prejudice from the absence in order to obtain a new trial, or whether the *Cronic* rule of automatic reversal applies in such situations.

Since the Supreme Court's landmark decision in *Gideon v. Wainwright*,[14] it has been black-letter constitutional law that a criminal defendant enjoys an absolute Sixth Amendment right to the assistance of counsel during the trial of any case in which he or she faces the prospect of incarceration.[15] Because of the fundamental importance of the right to counsel, the Court has repeatedly affirmed that the denial of the right to counsel is a "structural" error—an error requiring automatic reversal of a criminal defendant's conviction without any showing of prejudice.[16]

Until very recently, the lower courts had nearly uniformly applied the rule of automatic reversal to any absence of counsel during *any* significant portion of a criminal trial. Since 2002, however, several lower courts, including three federal circuits, have concluded that the rule of automatic reversal does not necessarily apply to significant but temporary absences during criminal trials, and that instead, the defendant must point to specific prejudice arising from counsel's absence to obtain relief.[17]

In this Article, I will argue that these recent refusals to apply the *Cronic* rule to temporary absences of counsel during trial are wrong.

12. *Green*, 809 F.2d at 1262–64.
13. *Hudson*, 351 F.3d at 216–18.
14. 372 U.S. 335 (1963).
15. *See, e.g.*, Shelton v. Alabama, 535 U.S. 654, 662–63 (2002) (holding Sixth Amendment right to counsel violated when indigent defendant was convicted of misdemeanor without benefit of counsel and was sentenced to probation, the violation of which could result in jail sentence).
16. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 629–30 (1993) ("The existence of structural defects—deprivation of the right to counsel, for example—requires automatic reversal of the conviction because they infect the entire trial process.").
17. *See, e.g.*, United States v. Toliver, 330 F.3d 607, 613–14 (3d Cir. 2003) (refusing to apply automatic reversal to absence of counsel at colloquy with deliberating jury); *Hudson*, 351 F.3d at 216–18 (same); Ellis v. United States, 313 F.3d 636, 643–44 (1st Cir. 2002) (same).

In other words, I will argue that the result in Pamela Green's case was correct and the result in David Hudson's case was incorrect because the absence of counsel from any significant portion of a criminal trial should automatically result in a new trial, unless the defendant has specifically waived the right to have counsel present.

In support of this argument, I will first show that there are no doctrinal reasons to explain the recent refusal of the lower courts to apply the *Cronic* rule of automatic reversal in temporary-absence cases. On the contrary, in *Bell v. Cone*,[18] the Supreme Court's most recent case applying the *Cronic* standard, the Court concluded that the rule of automatic reversal did not apply to the alleged deficient performance of defense counsel in that case, but took pains to reaffirm that actual absence of counsel from a critical stage remains an error that does require automatic reversal.[19]

Second, I shall argue that, even aside from precedent, the *Cronic* rule of automatic reversal should apply to temporary absences of counsel during criminal trials because such errors are truly "structural"—that is, not amenable to meaningful harmless-error review. A reviewing court cannot possibly assess the effect of counsel's absence from a cold transcript because such review completely misses an essential part of counsel's role: to tailor his or her case to the reactions of the jury. As a corollary to that point, practical considerations require that temporary attorney absences during trial be treated as structural error because it is very difficult to identify exactly what counsel would have done had he been present when he was, in fact, not present. In other words, because trial judges realize that it will usually be impossible for criminal defendants to establish prejudice from the temporary absence of their attorneys, appellate courts must apply the *Cronic* rule to firmly discourage judges from conducting any trial proceedings without counsel present.

II. THE FUNDAMENTAL NATURE OF THE RIGHT TO COUNSEL AT TRIAL

To understand why the temporary absence of counsel from a criminal trial should be treated as an error requiring automatic reversal of a resulting conviction, it is first necessary to review the established contours of the right to counsel in criminal cases. In this Part, I will briefly review the historical development of the constitutional right to counsel. In doing so, I will emphasize how the doctrine has developed to require the assistance of counsel throughout an entire criminal case

18. Bell v. Cone, 535 U.S. 685, 696–98 (2002).

19. *See id.* at 695 ("A trial would be presumptively unfair, we said [in *Cronic*], where the accused is denied the presence of counsel at 'a critical stage . . . .'" (quoting United States v. Cronic, 466 U.S 648, 662 (1984))).

from the moment charges are filed through a first appeal of the conviction.

I will then discuss how the Supreme Court came to regard the right to counsel as so fundamental that a violation of the right became structural error—that is, error requiring automatic reversal of a conviction. I will distinguish the Court's cases holding that various types of attorney error are subject to harmless-error review from those holding that absence of counsel at a critical stage of the proceedings are not subject to such review.

A. A Brief Historical Review of the Right to Counsel

The Sixth Amendment guarantees the accused in a criminal case the "Assistance of Counsel for his defence."[20] Despite this seemingly clear language, however, the Sixth Amendment right to counsel was initially understood to mean only that a criminal defendant who could afford to retain an attorney would be allowed to have the attorney assist with the defense.[21] The drafters of the Sixth Amendment deemed this provision necessary because at the time of the American Revolution, English law did not permit a criminal defendant charged with a felony, other than treason, to have counsel assist him or her at trial.[22] The Sixth Amendment was thus not understood to guarantee federal defendants the right to *appointed* counsel, nor, as a matter of historical practice, did any of the colonies provide counsel to indigent criminal defendants.

Until 1932, the constitutional right to counsel consisted of nothing more than the right of a criminal defendant to hire a lawyer to assist him or her at trial. In that year, however, the Court held for the first time in *Powell v. Alabama* that the Fourteenth Amendment Due Process Clause requires state courts to appoint counsel for indigent defendants facing capital charges.[23]

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20. U.S. CONST. amend. VI.

21. *See generally* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 9–21 (2002) (discussing original purpose of the Sixth Amendment).

22. *See* Powell v. Alabama, 287 U.S. 45, 60–61 (1932) (discussing English law at the time the Constitution was ratified). By the time the Sixth Amendment was ratified, the English rule barring counsel in felony cases had come under criticism in England, *see* 4 WILLIAM BLACKSTONE, COMMENTARIES 349 (1769) ("For upon what face of reason, can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?"), and the American colonies had rejected it, *see Powell*, 287 U.S. at 64–65 (explaining that at least twelve of the thirteen colonies had rejected the English rule).

23. *Powell*, 287 U.S. at 71 ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .").

While *Powell* did not spell out exactly when counsel must be appointed in a capital case, it did stress that, once appointed, counsel's assistance is necessary throughout the entire course of the proceedings:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel *at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[24]

Just six years after *Powell*, the Court held in *Johnson v. Zerbst*[25] that the Sixth Amendment guarantees the appointment of counsel for all federal defendants lacking the means to retain their own attorneys. The Court in *Zerbst* again stressed that a criminal defendant requires the assistance of counsel "at every step in the proceedings against him."[26] In order to ensure that the right to counsel is honored, courts must "indulge every reasonable presumption against waiver" of that right.[27]

In 1942, the Court declined in *Betts v. Brady*[28] to extend the *Zerbst* holding of a Sixth Amendment right to appointed counsel to the states and declined to extend the *Powell* holding of a right to appointed counsel in capital cases to non-capital cases. In so holding, the Court reasoned that the Fourteenth Amendment Due Process Clause "does not incorporate, as such, the specific guarantees found in the Sixth Amendment," nor does it obligate "the states, whatever may be their own views, to furnish counsel in every such case."[29]

Betts was, of course, overruled twenty-one years later in *Gideon v. Wainwright*,[30] which held that the Due Process Clause does incorporate the Sixth Amendment right to counsel and, therefore, states must appoint counsel for indigent defendants in non-capital as well as capital cases. While *Gideon* was obviously a landmark case for the right to counsel, the Court's opinion left open many questions, such as whether indigents were entitled to appointed counsel for misdemean-

24. *Id.* at 68–69 (emphasis added).

25. 304 U.S. 458, 467–68 (1938).

26. *Id.* at 463 (internal quotation marks omitted) (quoting *Powell*, 287 U.S. at 69).

27. *Id.* at 464 (internal quotation marks omitted) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

28. 316 U.S. 455 (1942).

29. *Id.* at 461–62, 471.

30. 372 U.S. 335, 339 (1963).

ors and petty offenses, and whether counsel was required to be appointed for pre-trial proceedings, and if so, at what point.[31]

One point that clearly emerged from *Gideon*, however, is that absence of counsel from a criminal trial is *structural* error—again, error requiring automatic reversal of the conviction. *Gideon* left no doubt that, contrary to the Court's holding in *Betts*, a criminal defendant who has been denied counsel could not receive a fair trial because "lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[32]

Since *Gideon*, the Court has answered most or all of the questions left open. The Court held in 1972 that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[33] Five years later, the Court confirmed that a defendant's Sixth Amendment right to counsel begins "at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[34]

Of course, a defendant facing criminal charges is entitled to the "assistance of counsel," not to have her attorney physically present with her at every moment of the day while the charges are pending. At the same time, the Court recognized that "today's law enforcement machinery involves critical confrontations of the accused by the prose-

31. For an excellent contemporaneous treatment of the *Gideon* case, including a discussion of the issues the Court left undecided, see ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

32. *Gideon*, 372 U.S. at 344.

33. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). In *Scott v. Illinois*, 440 U.S. 367, 372–74 (1979), the Court held that *Argersinger* was limited to "actual imprisonment," so that an indigent charged with a petty offense carrying the potential of imprisonment could be denied counsel so long as the judge did not actually sentence the indigent to jail. In *Alabama v. Shelton*, 535 U.S. 654, 661–62 (2002), the Court refined the *Argersinger* standard further by specifying that an indigent denied counsel for a petty offense could not be given a suspended jail sentence or some other sentence that might result in incarceration upon violation of the terms of probation.

34. Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). The Court has also held that the Fourteenth Amendment guarantees indigents the assistance of counsel for the first direct appeal from a criminal conviction. *See* Halbert v. Michigan, 125 S. Ct. 2582, 2591–94 (2005) (holding that indigents are entitled to counsel for first-tier direct appeal by leave of appellate court); Douglas v. California, 372 U.S. 353 (1963) (holding that indigents are entitled to counsel for first-tier direct appeal by right). *But see* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (holding that indigents are not entitled to counsel for collateral review of criminal convictions); Ross v. Moffitt, 417 U.S. 600, 610 (1974) (holding that indigents are not entitled to counsel for appeals beyond first-tier direct appeal).

cution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[35] Therefore, the Court developed the notion of "critical stages" to identify those proceedings or points in the process where a defendant is entitled to the assistance of counsel because "[w]hat happens there may affect the whole trial."[36] Such critical stages include, in addition to the trial itself, virtually all types of pretrial hearings, such as arraignments[37] and preliminary hearings,[38] as well as various types of out-of-court confrontations, such as police questioning[39] and live identification proceedings.[40]

In sum, a criminal defendant currently enjoys a Sixth Amendment right to the assistance of counsel once adversarial judicial proceedings have begun for any offense for which she faces actual imprisonment, and she is entitled to have that counsel assist her at pretrial hearings, throughout the trial, and at any other point in the process at which her trial rights might be affected.

B. The Right to Counsel and the Rule of Automatic Reversal

Starting with *Powell*, in every case in which the Court found that a criminal defendant had been denied the right to counsel at trial, it simply reversed the conviction without pausing to consider whether the denial of counsel actually affected the outcome. Given the Court's very strong language in *Powell* about the necessity of counsel "every step" of the way[41] and the even stronger language in *Gideon* declaring the right to counsel as "fundamental,"[42] one could reasonably conclude that the Court felt that it went without saying that the erroneous denial of counsel was an error important enough to automatically require a new trial.

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35. United States v. Wade, 388 U.S. 218, 224 (1967). The Court in *Wade* concluded that a pretrial lineup procedure was a critical proceeding for which a defendant has the right to counsel. *Id.* at 236–37.
36. Hamilton v. Alabama, 368 U.S. 52, 54 (1961). Even though *Hamilton* predated *Gideon*, the defendant in *Hamilton* was entitled to counsel under *Powell v. Alabama*, 287 U.S. 45 (1932), because he was charged with a capital offense. *Id.* at 54–55.
37. *Hamilton*, 368 U.S. at 53–54.
38. Coleman v. Alabama, 399 U.S. 1 (1970).
39. *See Williams*, 430 U.S. at 401 (holding that police detective's deliberate elicitation of incriminating information from defendant in the absence of counsel and after arraignment violated Sixth Amendment).
40. *See Wade*, 388 U.S. at 236–38 (holding that live identification procedure held in the absence of counsel after formal charges filed violated Sixth Amendment). *But see* United States v. Ash, 413 U.S. 300 (1973) (holding that photographic identification procedure held after filing of formal charges is not "critical stage" requiring presence of counsel).
41. *See supra* note 24 and accompanying text.
42. *See supra* note 32 and accompanying text.

On the other hand, the absence of discussion in the early cases of whether the error actually merited a new trial could also be chalked up to the fact that the Court had not yet systematically considered the question of whether all constitutional errors automatically required new trials. It was not until 1967 that the Court finally concluded in *Chapman v. California*[43] that not all constitutional errors require automatic reversal.[44] Instead, the Court held, the proper standard for review of most types of constitutional error is to determine whether the error was "harmless beyond a reasonable doubt."[45]

In holding that most constitutional errors are subject to harmless-error review, the Court was careful to note that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[46] As one of three examples of such fundamental rights, the Court cited the right to counsel announced in *Gideon*.[47]

The Court eventually defined the category of "structural errors"[48]—errors requiring automatic reversal—in a more systematic way. In *Arizona v. Fulminante*, the Court concluded that the erroneous admission of a coerced confession at trial should be subject to the *Chapman* "harmless-beyond-a-reasonable-doubt" rule,[49] despite the footnote in *Chapman*, which cited the admission of a coerced confes-

43. 386 U.S. 18, 21–22 (1967).

44. This is not to say that the Court had automatically reversed all convictions before *Chapman* upon identifying a constitutional error without considering whether the error affected the outcome. Instead, the Court sometimes assumed, without holding, that some showing of prejudice was required. *See, e.g.*, Fahy v. Connecticut, 375 U.S. 85, 87 (1963) (declining to decide whether admission of evidence seized in violation of Fourth Amendment required automatic reversal because "we find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial"); Napue v. Illinois, 360 U.S. 264, 272 (1959) (concluding that perjured testimony knowingly introduced by prosecution violated due process and required new trial because "our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial"). Until *Chapman*, however, the Court never actually held that constitutional errors were subject to harmless-error analysis.

45. *Chapman*, 386 U.S. at 24.

46. *Id.* at 23.

47. *Id.* at 23 n.8. The other two examples of errors requiring automatic reversal were the use of coerced confessions and the lack of an impartial judge. *Id.* (citing Payne v. Arkansas, 356 U.S. 560 (1958); Tumey v. Ohio, 273 U.S. 510 (1927)).

48. The Court first used the term "structural defects" to refer to those errors requiring automatic reversal in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Since 1996, the Court has primarily used the term "structural error" to describe such errors. *See, e.g.*, United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004); United States v. Cotton, 535 U.S. 625, 631 & n.2 (2002); Tyler v. Cain, 533 U.S. 656, 665–67 (2001); Neder v. United States, 527 U.S. 1, 8, 14 (1999). *But see* California v. Roy, 519 U.S. 2, 5 (1996) (per curiam) (using both terms).

49. *Fulminante*, 499 U.S. at 306–12.

sion as an example of error requiring automatic reversal.[50] In so holding, the Court distinguished an error requiring automatic reversal from a "trial error"—that is, an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[51]

In contrast to trial errors, the *Fulminante* majority continued, structural errors, such as "the total deprivation of the right to counsel at trial" at issue in *Gideon* or the presence of a biased judge, "defy analysis by 'harmless-error' standards."[52] Such errors, the Court reasoned, affect the "entire conduct of the trial from beginning to end."[53] After setting forth several other examples of structural errors—including racial discrimination in the selection of the grand jury that indicted the defendant, denial of the defendant's right to represent himself, and denial of the right to a public trial—the Court concluded that "[e]ach of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[54]

On several occasions since *Fulminante*, the Court has stressed that an essential distinction between a trial error and a structural error is the inability of a reviewing court to accurately assess the impact of the latter on the result. Thus, in *Sullivan v. Louisiana*, the Court unanimously concluded that a jury instruction that allowed a jury to convict a criminal defendant on less proof than could establish guilt beyond a reasonable doubt amounted to structural error. The Court offered two reasons for its decision. First, the jury did not actually find any facts beyond a reasonable doubt.[55] Second, the effect of such a defective instruction was "necessarily unquantifiable and indeterminate."[56] On the other hand, in *Neder v. United States*,[57] a sharply divided Court concluded that the omission of an element from the jury instructions is trial error subject to harmless-error analysis because the likelihood that the jury would have found the missing element can be quantified, given the record of evidence admitted.

The Court has never retreated, however, from the rule that the denial of the constitutional right to counsel at a critical stage is struc-

50. *See supra* note 47.
51. *Fulminante*, 499 U.S. at 307–08.
52. *Id.* at 309.
53. *Id.*
54. *Id.* at 310.
55. 508 U.S. 275, 280–82 (1993).
56. *Id.* at 282.
57. 527 U.S. 1, 12–15 (1999).

tural error requiring automatic reversal.[58] The Court's clearest and most cited statements of the rule of automatic reversal are still found in *United States v. Cronic*: "a trial is unfair if the accused is denied counsel at a critical stage of his trial," and "[t]he Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."[59]

Cronic confirmed that the rule of automatic reversal applies to three distinct classes of counsel deprivations. First, reversal is required when counsel is absent from a critical stage of the trial. Second, automatic reversal is necessary when counsel is present but completely fails to subject the government's case to "meaningful adversarial testing."[60] The third type of error requiring automatic reversal occurs when counsel is present but is somehow prevented by state action from actually assisting the defendant at a critical stage of the proceedings.[61] Such "state interference" cases typically arise when a statute, court rule, or ruling of the court prevents a defense attorney from performing his customary functions. The Court has therefore reversed convictions without performing harmless-error analysis when the judge refused to allow defense counsel to make a closing argument,[62] when state law required defense counsel to call his client as his first witness or not at all,[63] when state law prevented defense counsel from calling his client as a witness,[64] and when the judge refused to let defense counsel consult with his client during an overnight recess in the trial.[65]

In sharp contrast to the rule of automatic reversal for a Sixth Amendment violation that amounts to a "*Cronic* error," errors involving incompetent performance by defense attorneys are reviewed under the exacting two-part test announced in *Strickland v. Washington*.[66] Under the *Strickland* standard, the defendant is not entitled to a new trial unless she demonstrates that her attorney performed so poorly that he was not acting as "counsel" within the meaning of the Sixth Amendment *and* that there was a "reasonable probability" of a better

58. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 629 (1993); *Fulminante*, 499 U.S. at 309.

59. 466 U.S. 648, 659 & n.25 (1984).

60. *Id.* at 659.

61. *See id.* at 660–61 (characterizing *Powell v. Alabama* as such a case, noting that "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial").

62. Herring v. New York, 422 U.S. 853 (1975).

63. Brooks v. Tennessee, 406 U.S. 605 (1972).

64. Ferguson v. Georgia, 365 U.S. 570 (1961).

65. Geders v. United States, 425 U.S. 80 (1976).

66. 466 U.S. 668 (1984).

outcome but for her attorney's mistakes.[67] For conflict of interest claims, the Court developed yet another standard in *Cuyler v. Sullivan*[68] to determine whether reversal is required: whether the defendant can show "that an actual conflict of interest adversely affected his lawyer's performance."[69]

In sum, the Court has developed four standards of reversal applicable to Sixth Amendment right-to-counsel errors. First, the *Cronic* rule of automatic reversal applies to the actual or functional absence of counsel and to state interference with the function of counsel at critical stages of the trial. Second, the *Strickland* rule requiring the defendant to show that a different outcome was reasonably probable applies to claims that counsel committed serious errors during their representation. Third, the *Cuyler* rule requiring the defendant to show an adverse effect on the lawyer's performance applies to claims that counsel labored under an actual conflict of interest. And fourth, Sixth Amendment claims not fitting within any of the above categories are reviewed under the *Chapman* standard to decide whether the error was harmless beyond a reasonable doubt.

With this background in place, we are now ready to turn to the question of whether the rule of automatic reversal or some other test should apply to the temporary absence of counsel during a criminal trial. In the next Part, I will discuss why the problem occurs at all.

III. THE SPECIAL PROBLEM OF TEMPORARILY ABSENT COUNSEL

All of the Supreme Court's right-to-counsel cases have involved either the complete denial of counsel, as in *Gideon*; or the presence of counsel who is alleged to have performed deficiently, as in *Strickland*, *Cuyler*, and the state interference cases. The Court has never squarely confronted the problem of counsel who is present for some portions of the trial but not all of it, though the issue has arisen many times in state courts and the lower federal courts.

In the following sections, I shall begin with a brief discussion of how it happens that defense lawyers can be temporarily absent during a criminal trial. I will then show that almost all federal and state courts formerly applied a rule of automatic reversal to such temporary absences but that a significant split of authority on that question has developed in recent years.

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67. *Id.* at 687, 694.

68. 446 U.S. 335 (1980).

69. *Id.* at 348.

A. Where Did She Go? How and Why Counsel Goes Missing

One could be forgiven for believing that no criminal defense attorney would ever miss part of a trial at which he or she is representing a defendant. It might seem obvious that a fundamental part of the professional responsibility of any attorney in any type of case, civil or criminal, is to be there for the entire trial. Of course, this is true.[70] Even if for some reason an attorney left or did not show up for a session of the trial, one might reasonably assume that the judge would be professionally obligated to postpone further proceedings until the attorney returned. This, of course, is also true.[71] Even if the lawyer's and judge's professional responsibilities and obligations were not enough, it should be even more obvious to all concerned that counsel must be present throughout an entire criminal trial since a criminal defendant has a firmly established constitutional right to be represented by counsel at all critical stages of the case.

Therefore, there is no real dispute that it is a very serious constitutional error when a portion of a criminal trial is conducted in the absence of the defendant's attorney (unless, of course, the defendant has affirmatively and knowingly waived her right to have her attorney present). Given this black-letter law, temporary-absence-of-counsel cases should be exceedingly rare.

Nonetheless, there are a surprisingly large number of reported cases in which defense attorneys were temporarily absent for substantial periods of time during criminal trials. While there are a variety of reasons why such absences occur, the cases tend to fall into three categories.

The first category consists of cases in which judges affirmatively permit attorneys to leave for portions of the trials. One typical scenario in which this error occurs is when the judge permits the attorney for one defendant in a multidefendant trial to leave, in the mistaken belief that the continued presence of the codefendants' attorneys is sufficient to protect the defendant's Sixth Amendment right to counsel. For example, in *Green v. Arn*,[72] a case discussed earlier, the judge allowed Green's attorney to leave during the victim's testimony so that he could attend a sentencing hearing for another client. The judge apparently concluded that leaving Green without representation during the victim's testimony would not violate Green's rights because her attorney assured the judge before he left that he would be content to rely on the codefendants' attorney to conduct an adequate

70. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004) (requiring lawyer to act "with reasonable diligence" in representing client).

71. *See generally* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) & cmt. (2004) (requiring judges to avoid proceedings in the absence of a party's lawyer).

72. 809 F.3d 1257 (6th Cir. 1987).

cross-examination.[73] Similarly, the judge in *Olden v. United States*[74] permitted defense counsel to leave several times during the trial, including periods during which witnesses implicated his client, after receiving assurances that Olden would rely on his codefendants' attorneys to represent his interests.

As a variation on this scenario, the judge in a multidefendant trial might erroneously permit counsel for one defendant to temporarily leave on the ground that upcoming proceedings will primarily or exclusively concern the codefendants. Thus, in *Vines v. United States*,[75] the judge permitted counsel to leave for the remainder of the day because the prosecution planned to call witnesses who would testify only about Mr. Vines' codefendants. In yet another variation, the judge might allow defense counsel to leave the trial after counsel indicates that he does not believe that his presence is necessary. In *Hudson v. Jones*,[76] also discussed earlier, the judge permitted Hudson's lawyer to leave after the lawyer announced that he would trust the judge to properly answer any questions the jury might have during deliberations.

A second category of temporary-absence cases consists of situations in which impatient judges conduct proceedings without waiting for the defendants' attorneys to arrive. This scenario has arisen most frequently during jury deliberations when the jury sent out a note that required the judge to deliver further instructions. For example, in *Curtis v. Duval*,[77] the judge waited twenty minutes for Curtis's attorney to arrive before deciding to answer the jury's question in the absence of defense counsel. The judge in *French v. Jones*[78] was even more impatient; she waited only seven minutes before deciding to reinstruct a deadlocked jury without defense counsel. The judges in *Ellis v. United States*[79] and *United States v. Toliver*[80] decided to answer questions from deliberating juries without notifying or waiting for counsel at all. While such errors most commonly have occurred during jury deliberations, an impatient trial judge in *State v. Colbert*[81] decided to proceed with jury selection when defense counsel failed to

73. *Id.* at 1260–61.

74. 224 F.3d 561, 568–69 (6th Cir. 2000). One of the absences was because counsel wanted to attend a funeral. *Id.*

75. 28 F.3d 1123, 1125–26 (11th Cir. 1994). The Eleventh Circuit noted that the record is unclear as to exactly why counsel for Mr. Vines needed to leave. *Id.* at 1125 n.2.

76. 351 F.3d 212, 213–14 (6th Cir. 2003).

77. 124 F.3d 1, 4 (1st Cir. 1997).

78. 332 F.3d 430, 434 (6th Cir. 2003). In the interests of full disclosure, I represented Mr. French on the appeal of his conviction.

79. 313 F.3d 636, 642 (1st Cir. 2002).

80. 330 F.3d 607, 609 (3d Cir. 2003).

81. 316 S.E.2d 79, 79–80 (N.C. 1984).

show up on time. The trial judge in *People v. Margan*[82] told the prosecutor to begin the direct examination of his first witness without waiting for the defense attorney to arrive.

A third, and most notorious, category consists of cases in which counsel is temporarily "absent," despite being physically present, because he has fallen asleep during the trial. In *Javor v. United States*, for example, a magistrate found that Mr. Javor's attorney was "asleep or dozing, and not alert to proceedings, during a substantial part of the trial."[83] Similarly, the defense lawyer in *Tippins v. Walker*[84] slept every day during the trial.

By far the most famous of the "sleeping lawyer" cases is the Texas death penalty trial of Calvin Burdine.[85] In a trial that consumed less than thirteen hours of court time, Burdine's appointed lawyer, Joe Cannon, fell asleep as many as ten times.[86] To the surprise of none of the observers of the trial, Burdine was convicted and sentenced to death. Unfortunately, Burdine's case is far from the only example of a capital trial during which the defense lawyer fell asleep.[87]

Thankfully, temporary absences of defense counsel during criminal trials remain quite rare. However, as the cases discussed in this section demonstrate, it is a constitutional error that recurs frequently enough that it should be of concern to the criminal justice system. In recent years, the courts have agreed that temporary absences of counsel during trials are serious errors, but have not agreed on whether the rule of automatic reversal should apply. In the next section, I discuss that split of authority.

B. Temporary Absences and Structural Error: The Recent Shift

The many appellate courts that have confronted instances of temporarily absent criminal defense attorneys since the Court issued the *Cronic* and *Strickland* decisions in 1984 have had four possible standards of reversal from which to choose. First, a reviewing court acting on either direct appeal or habeas corpus review could regard the tem-

82. 554 N.Y.S.2d 676, 676–77 (App. Div. 1990).
83. 724 F.2d 831, 832 (9th Cir. 1984).
84. 77 F.3d 682, 687 (2d Cir. 1996).
85. *See* Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc).
86. *See id.* at 338–39 (recounting testimony of three jurors and court clerk providing varying estimates as to number of times Cannon slept during trial).
87. *See, e.g.*, Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 843–44 (2003) (discussing another capital case during which Cannon slept); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 829–30 (discussing three Texas capital cases, including *Burdine*, during which defense counsel slept).

porary absence of counsel from a criminal trial as a *Cronic* error. That is, the court could conclude that such an absence, without a fully effective waiver, amounts to denial of counsel at a critical stage. Under the *Cronic* approach, such an error is structural and therefore requires automatic reversal of the conviction and a new trial, even if the defendant cannot demonstrate that counsel's temporary absence prejudiced him.[88]

Second, when acting on direct appeal, a reviewing court might conclude that a temporary absence of counsel is different in kind and degree from the total absence or denial of counsel at issue in *Gideon*. Put another way, an appellate court might decide that a temporary absence of counsel is not structural because the effect of the error can be assessed.[89] If the trial court were at fault for allowing the trial to proceed temporarily without counsel, a reviewing court on direct appeal that regarded the error as non-structural would apply the *Chapman* harmless-error test. Therefore, such a reviewing court would reverse the conviction and order a new trial unless the prosecution could show that the temporary absence of counsel was harmless beyond a reasonable doubt.[90]

Third, a reviewing court on direct appeal could also regard the temporary absence of counsel as an example of deficient representation subject to the *Strickland* test. Under this approach, the court would reverse the conviction and order a new trial only if the defendant could show that there was a "reasonable probability" of a better outcome had counsel not been temporarily absent.[91]

Fourth, if the matter reached the reviewing court on federal habeas corpus review and the court concluded that the temporary absence of counsel was not structural, the court would order a new trial only if it concluded that the absence had a "substantial and injurious effect or influence in determining the jury's verdict."[92]

Between 1984, when the Court decided *Cronic* and *Strickland*, and 2002, almost all of the reported decisions from state and federal appel-

88. *See* United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding . . . ."); *see also* Brecht v. Abrahamson, 507 U.S. 619, 629–30 (1993) (recognizing that deprivation of the right to counsel and other structural errors require automatic reversal on habeas corpus review).

89. *Cf.* Sullivan v. Louisiana, 508 U.S. 275, 280–82 (1993) (concluding that defective reasonable doubt instruction is structural error because its effect on jury cannot be quantified or determined).

90. Chapman v. California, 386 U.S. 18, 24 (1967).

91. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) ("[D]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

92. *Brecht*, 507 U.S. at 637 (internal quotation marks omitted) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

late courts applied the *Cronic* rule of automatic reversal to temporary absences of defense counsel from criminal trials.[93] Given a showing that defense counsel in a criminal trial was temporarily absent from the trial, the usual outcome was that the conviction was reversed and a new trial was ordered, even if the defendant could not specifically explain how he or she was prejudiced by counsel's temporary absence.

Since mid-2002, however, most of the reported decisions have treated temporary absences as non-structural and have therefore applied either the *Chapman* or *Strickland* tests on direct appeal or the *Brecht* test on federal habeas corpus review.[94] In other words, most courts in the last few years have held that a temporary absence of counsel from a criminal trial does not automatically require reversal and have instead required some showing of prejudice before ordering a new trial.

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93. The *Cronic* rule of automatic reversal has been applied when counsel was temporarily absent during the taking of testimony, *see, e.g.*, Olden v. United States, 224 F.3d 561, 568 (6th Cir. 2000); Green v. Arn, 809 F.2d 1257, 1263 (6th Cir. 1987); People v. Margan, 554 N.Y.S.2d 676, 677–79 (App. Div. 1990); McKnight v. State, 465 S.E.2d 352, 353–54 (S.C. 1995), when counsel was absent from a sentencing hearing, *see* Golden v. Newsome, 755 F.2d 1478, 1483–84 (11th Cir. 1985), and in cases when counsel fell asleep during proceedings, *see, e.g.*, Burdine v. Johnson, 262 F.3d 336, 345–49 (5th Cir. 2001) (en banc); Tippins v. Walker, 77 F.3d 682, 685–89 (2d Cir. 1996). Other cases also provide indirect support for the use of the *Cronic* rule to temporary absences of counsel. *See* Curtis v. Duval, 124 F.3d 1, 4–6 (1st Cir. 1997) (concluding that *Cronic* rule of automatic reversal would have applied to habeas petition raising absence of counsel from jury deliberations if trial had been held after *Cronic* was decided); State v. Colbert, 316 S.E.2d 79, 81 (N.C. 1984) (applying automatic reversal to temporary absence of counsel from jury selection without citing *Cronic*). *But see* Vines v. United States, 28 F.3d 1123, 1128–31 (11th Cir. 1994) (refusing to apply *Cronic* and instead applying *Brecht* substantial-and-injurious-effect test to habeas corpus petition raising absence of counsel during prosecution's case); United States v. Morrison, 946 F.2d 484, 502–04 (7th Cir. 1991) (applying *Strickland* to absence of counsel during reinstruction of deliberating jury).

94. *See, e.g.*, James v. Harrison, 389 F.3d 450, 454–57 (4th Cir. 2004) (holding on habeas corpus review that state court properly applied *Strickland* instead of *Cronic* to absence of defense counsel during jury selection); United States v. Toliver, 330 F.3d 607, 613–16 (3d Cir. 2003) (refusing to apply *Cronic* to absence of counsel from reinstruction of jury and instead applying *Chapman* test); Hudson v. Jones, 351 F.3d 212, 216–18 (6th Cir. 2003) (refusing to apply *Cronic* to absence of counsel from re-reading of jury instructions); Ellis v. United States, 313 F.3d 636, 643–45 (1st Cir. 2002) (refusing to apply *Cronic* to counsel absence from colloquy with deliberating jury and instead applying *Brecht* test to habeas corpus petition); Hodges v. State, 116 S.W.3d 289, 292–94 (Tex. App. 2003) (refusing to apply *Cronic* and instead applying *Chapman* to absence of counsel during punishment phase of non-capital trial). *But see* Caver v. Straub, 349 F.3d 340, 347–51 (6th Cir. 2003) (applying *Cronic* to absence of counsel from reinstruction of deliberating jury); French v. Jones, 332 F.3d 430, 437–39 (6th Cir. 2003) (same); State v. Perrin, 897 So. 2d 749, 752–53 (La. Ct. App. 2005) (applying *Cronic* to absence of counsel from jury instructions).

It would be difficult to overstate the importance of the change in harmless-error tests that courts have applied to temporary-absence cases since 2002. In almost every temporary-absence case since 1984, a court that has applied any test other than the *Cronic* rule of automatic reversal has ultimately ruled that the error was harmless, and therefore, has refused to order a new trial.[95]

To put it as plainly as possible, the choice of test is almost always outcome determinative to temporary-absence-of-counsel cases. If the reviewing court concludes *Cronic* applies, as almost all courts did until 2002, the defendant will automatically receive a new trial. If, on the other hand, the reviewing court, like the majority of courts since 2002, concludes that a harmless-error test, and not *Cronic*, applies to the temporary absence of counsel from the trial, the defendant's conviction will almost certainly be affirmed.

IV. WHY TEMPORARY ABSENCES SHOULD BE REGARDED AS STRUCTURAL ERROR

When defense counsel is absent from the courtroom (either physically not present or unconscious) during any significant portion of a criminal trial, the defendant should automatically receive a new trial. This was the rule that appellate courts almost always applied until recently, but a significant split of authority has developed in the last few years.

In this Part, I will explain why the rule of automatic reversal should apply to temporary-absence cases. First, as a purely doctrinal matter, I will show that there has been no recent change in the governing legal principles that can adequately explain why some courts have refused to apply the *Cronic* rule to temporary-absence cases. Second, I will argue that, aside from the state of the precedent, the temporary absence of defense counsel is a perfect example of the type of error that traditionally has been regarded as structural error. In particular, the error should be seen as structural because a reviewing court cannot possibly accurately assess the impact of a temporary absence of counsel from a critical stage of a trial. Application of the rule of automatic reversal to temporary absences is also appropriate because, as a matter of fundamental fairness, a defendant who is temporarily abandoned should automatically receive a new trial. Finally, I will explain why automatic reversal is necessary to reduce the instances of temporary absences of defense counsel.

95. Of the numerous cases cited in the previous two footnotes, *Hodges* is the only one in which a reviewing court applied a harmless-error test and still found the error required reversal. *See Hodges*, 116 S.W.3d at 294. In every other case in which the courts applied a test other than the *Cronic* rule of automatic reversal, the defendant's conviction was affirmed.

A. Supreme Court Precedent and the Recent Refusal to Apply *Cronic*

Because some appellate courts have recently refused to apply the *Cronic* rule of automatic reversal to cases of temporary absences, the question naturally arises as to why there has been a shift. One possible answer is that in 2002, the Supreme Court decided *Bell v. Cone*,[96] the first case since *Cronic* in which the Court has squarely considered whether to apply the *Cronic* rule of automatic reversal to an alleged functional absence of counsel.

Cone, however, did not involve an actual absence of counsel. Cone, who had been convicted of two counts of first-degree murder and sentenced to death, complained in his state collateral appeal that his attorney had provided ineffective assistance at the penalty phase by failing to present mitigating evidence and by waiving his opportunity to give a final argument.[97] The state courts, concluding that defense counsel had represented the defendant conscientiously at the penalty phase, rejected this claim under the *Strickland* standard.[98] On federal habeas corpus review, however, the Sixth Circuit concluded that counsel's failure to make a closing argument during the penalty phase amounted to *Cronic* error.[99]

By a vote of 8–1, the Supreme Court rejected the application of *Cronic* to counsel's decision to waive his closing argument during the penalty phase. Instead, the Court concluded, as the state courts had, that *Strickland* supplied the proper test to assess counsel's decision to waive argument.[100]

In reaching that conclusion, the Court observed that *Cronic* had "identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'"[101] The Court continued:

> First and "[m]ost obvious" was the "complete denial of counsel." A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at "a critical stage," a phrase we used in *Hamilton v. Alabama*, 358 U.S. 52, 54 (1961), and *White v. Maryland*, 373 U.S. 59, 60 (1963) (*per curiam*), to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. Second, we posited that a similar presumption was warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Finally, we said that in cases like *Powell v. Alabama*, 287 U.S. 45 (1932), where counsel is called upon to

96. 535 U.S. 685 (2002).

97. *Id.* at 690–92.

98. *Id.* at 692 (citing Cone v. State, 747 S.W.2d 353, 356–57 (Tenn. Crim. App. 1987)).

99. *Id.* at 693 (citing Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001)).

100. *Id.* at 698.

101. *Id.* at 695 (quoting United States v. Cronic, 466 U.S. 648, 658–59 (1984)).

> render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected.[102]

Cone claimed that his attorney's failure to make a closing argument fit within the second *Cronic* category, but the Court rejected this argument:

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points.[103]

Given this language, it is clear that *Cone* cannot fairly be read as undercutting the application of *Cronic* to temporary-absence-of-counsel cases. On the contrary, *Cone* explicitly reaffirmed the first *Cronic* exception: that automatic reversal is required when counsel is absent from a critical stage. The Court could not have made it any clearer that the language quoted above—requiring a "complete" failure to test the prosecutor's case, as opposed to a failure to "do so at specific points," applies *only* to the second *Cronic* exception, when counsel is physically and mentally present but fails to meaningfully test the prosecution's case.

While none of the courts that have recently refused to apply the rule of automatic reversal to temporary absences of counsel have gone so far as to claim that *Cone* precludes application of *Cronic* to such cases, one of those courts nevertheless cited *Cone* for the inarguable proposition that *Cronic* cases are rare.[104] Two of those courts attached heavy significance to the fact that the Supreme Court vacated and remanded the Sixth Circuit's decision in *French v. Jones*[105] for reconsideration in light of *Cone*.[106]

Of course, the courts that thought it significant that the Supreme Court had remanded *French* for reconsideration in light of *Cone* could not have known for certain that the Sixth Circuit would hold on re-

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102. *Id.* at 695–96 (citation omitted) (footnote omitted) (quoting *Cronic*, 466 U.S. at 659–62). In a footnote, the Court also noted that it had applied the rule of automatic reversal in cases in which defendants "had actually or constructively been denied counsel by government action." *Id.* at 696 n.3.

103. *Id.* at 696–97 (quoting *Cronic*, 466 U.S. at 659).

104. *See* Ellis v. United States, 313 F.3d 636, 643–44 (1st Cir. 2002) (citing *Cone*, 535 U.S. 685, and Mickens v. Taylor, 535 U.S. 162 (2002), in support of statement that "[t]he Supreme Court recently has emphasized how seldom circumstances arise that justify a court in presuming prejudice").

105. 282 F.3d 893 (6th Cir.), *vacated*, 535 U.S. 1109 (2002).

106. *See* United States v. Toliver, 330 F.3d 607, 614 (3d Cir. 2003) (finding *French* to be "only marginally instructive" because of remand for reconsideration); *Ellis*, 313 F.3d at 644 n.3 (observing that Ellis' argument "is not bolstered by his reliance on *French v. Jones*" since the Supreme Court had remanded *French* for reconsideration in light of *Cone*).

mand that *Cone* had no effect on the applicability of *Cronic* to the temporary absence of counsel.[107] But it would have taken very little analysis to realize, as the Sixth Circuit did on remand, that the Court's refusal in *Cone* to apply the second *Cronic* exception for failure to subject the state's case to meaningful adversarial testing had nothing to do with the question of whether the first *Cronic* exception still applies when counsel is absent from a critical stage of the trial. The *French* court correctly and succinctly distinguished *Cone*:

> The Supreme Court reversed [the decision in favor of Cone] because the petitioner did not allege that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, but alleged only that trial counsel failed at "specific points." In reaching this conclusion, the Court announced that to apply the second *Cronic* exception, "the attorney's failure must be complete." . . . *Cone* did not deal with a denial of counsel claim. Nor does the logic of [*Cone*'s] holding that the attorney's failure must be complete extend to claims based on the denial of counsel at a critical stage of the proceedings. Therefore, we conclude that *Cone* does not apply to claims of denial of counsel during a critical stage.[108]

Indeed, if the courts that thought it significant that *French* had been remanded for further consideration in light of *Cone* had looked more carefully at the circumstances of that remand, they might well have reached a different conclusion. The Court remanded three cases for reconsideration in light of *Cone* in June 2002, including *French*, and all three were cases in which the Sixth Circuit had applied the *Cronic* rule just as it had in *Cone*.[109] On the same day that the Court remanded *French* for further consideration, however, it denied certiorari in *Burdine*, a case manifestly involving a temporary absence of counsel.[110] In other words, it appears the Court remanded *French* for reconsideration not because the Court meant to cast doubt on the proposition that *Cronic* applies to absences of counsel from critical stages (a proposition it had just reaffirmed in *Cone*), but because *French* came from the same circuit as *Cone*.

In short, *Cone* reaffirmed that as a matter of doctrine, the *Cronic* rule should apply to absences of counsel from critical stages of a criminal trial. There have been no decisions from the Supreme Court since

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107. French v. Jones, 332 F.3d 430 (6th Cir. 2003).

108. *Id.* at 439 (citations omitted) (quoting *Cone*, 535 U.S. at 697). As the court noted in *French*, at least two other courts had already concluded by that time that *Cone* had no effect on claims involving actual absences of counsel. *Id.* at 439 n.6 (citing Hunter v. Moore, 304 F.3d 1066, 1070 n.4 (11th Cir. 2002); United States *ex rel.* Madej v. Schomig, 223 F. Supp. 2d 968, 971–72 n.2 (N.D. Ill. 2002)).

109. The other two cases were *Mason v. Mitchell*, 257 F.3d 554 (6th Cir. 2001) (applying *Cronic* to absence of counsel during pretrial period), *vacated*, 536 U.S. 901 (2002); and *Bell v. Quintero*, 256 F.3d 409 (6th Cir. 2001) (treating failure of counsel to object to participation of biased jurors as error falling within scope of *Cronic* rule), *vacated*, 535 U.S. 1109 (2002).

110. Cockrell v. Burdine, 535 U.S. 1120 (2002), *denying cert. to* Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc).

Cone that would suggest otherwise. Purely as a matter of precedent, then, it appears that the recent cases refusing to apply *Cronic* to temporary-absence cases are difficult to defend.

B. Temporary Absence of Counsel as a Paradigm Structural Error

The recent cases that have refused to apply the *Cronic* rule of automatic reversal to temporary absences of counsel have treated the matter as simply one of precedent. In other words, these decisions have simply concluded that *Cronic* does not apply, and therefore, the Sixth Amendment claims of those defendants are subject to some form of harmless-error analysis.[111] What is striking in these decisions is the lack of any substantial discussion as to whether the temporary absence of counsel *should* be regarded as a structural error requiring automatic reversal, even if the language of *Cronic* does not clearly dictate that outcome. Therefore, I will conclude with a discussion as to why temporary-absence cases should be regarded as structural error even if it were true that *Cronic* did not require that outcome.

First and most fundamentally, the temporary absence of counsel during a criminal trial is "structural" in the sense that it is an error that is not amenable to accurate assessment by a reviewing court because it is "necessarily unquantifiable and indeterminate."[112] The idea that a reviewing court can assess from a cold transcript the prejudice caused by counsel's absence completely ignores the role that counsel's physical presence in the courtroom actually plays.

The most obvious reason that the effect of the temporary absence of counsel is impossible to accurately assess is that the reviewing court cannot possibly discern from the transcript how the jury (or judge in a bench trial) reacted non-verbally to the proceedings that occurred in counsel's absence. During an ongoing trial, real-world trial counsel make crucial decisions based on the *reaction* of the jury to testimony, evidence, argument, and other courtroom proceedings.

As one example of this crucial point, counsel's presence during supplemental instructions to a deliberating jury is critical not just because she might object to an improper instruction, but also because she would watch the jury during the supplemental instructions to determine whether the instructions cleared up their questions or confused them further. Based on her own observations, she might request further or clarifying instructions or even move for a mistrial.

111. *See, e.g.*, James v. Harrison, 389 F.3d 450, 454–57 (4th Cir. 2004) (concluding that state court reasonably held that *Cronic* did not apply to absence of defense counsel during jury selection); *Toliver*, 330 F.3d at 613–16 (holding *Cronic* inapplicable to counsel absence from supplemental jury instruction); *Ellis*, 313 F.3d at 643–45 (same).

112. Sullivan v. Louisiana, 508 U.S. 275, 280–82 (1993).

Thus, while a supplemental instruction given in counsel's absence might appear to an appellate court to be entirely proper, the absence of counsel deprived the defendant of any opportunity to assure that those instructions, delivered during the most important part of the trial, were properly received and understood by the jury. Judge Karen Nelson Moore eloquently made this point in her dissent to the Sixth Circuit's reversal of the habeas corpus grant in *Hudson*:

> [W]hat drives the unreliability of jury reinstruction in the absence of counsel is not only counsel's inability to prevent the dissemination of erroneous new instructions, but also counsel's incapacity to respond to whatever motivated the jury to return to the court with some confusion or misunderstanding and to contribute to the resolution of that problem.
>
> While the literal re-reading of the initial jury instruction may appear to be harmless in the sense that it imparts no new information to the jury, the jury's desire for reinstruction or supplemental instruction is far from inconsequential. A jury asks for additional instructions or desires to hear the original instructions again because its members are confused, uncertain, internally quarreling, or because they failed to understand the instructions the first time, possibly because of an error or problem with the original instructions. When the jury returns to the court without a verdict, counsel, if present, can assess whether a reinstruction is appropriate or whether supplemental instructions or clarifications are needed.[113]

Similarly, if the attorney for one defendant in a multi-defendant trial is absent during presentation of testimony that concerns a codefendant, the reviewing court cannot possibly know whether the jurors might have found the testimony significant as to the defendant's guilt because the appellate judges were not in the courtroom when the witness testified. If counsel had been present during the testimony, he or she presumably would have watched the jurors for any suggestions that the jurors regarded the testimony as relevant to his or her client. A competent attorney who was present might well have decided to cross-examine a witness whose testimony was, in fact, irrelevant to the guilt of his or her client simply to drive home that point to jurors whose expressions suggested confusion on that score.

Nonetheless, the courts refusing to apply *Cronic* have typically concluded that the absences at issue were harmless because the defendants were unable to specifically articulate how their attorneys' presence could have made a difference.[114] The same, of course, could very often be said in reviewing an entire trial conducted in the absence of counsel. If the prosecution has presented an overwhelming case of guilt, it may be very difficult to imagine how an attorney could have changed the outcome. But it is precisely because a reviewing

113. Hudson v. Jones, 351 F.3d 212, 219–20 (6th Cir. 2003) (Moore, J., dissenting).

114. *See, e.g.*, *id.* at 218 (reversing grant of habeas corpus writ because "no actual prejudice has been shown" from absence of counsel at supplemental jury instruction); *Ellis*, 313 F.3d at 645–46 (concluding that "it is highly improbable that the ex parte supplemental instruction had any effect on the verdict" even though jury returned verdict less than one hour after receiving instruction).

court, armed with only a transcript, cannot possibly know how or whether an attorney could have changed the outcome that absence of counsel from a criminal trial is structural error in the first place.

A second reason that temporary absences of counsel should be considered structural error follows immediately from the first. Since it will usually be difficult or impossible for a criminal defendant to articulate exactly what it is her attorney could have done had he been there for the entire trial, any harmless-error rule other than automatic reversal means that temporary absences will almost always be found harmless. Indeed, as discussed in Part II, this is exactly what has happened in recent years as some courts have applied harmless-error analysis to temporary-absence claims.

The problem, then, with the application of harmless-error analysis to temporary absences is that trial judges will invariably realize that they can, when convenient, conduct trial proceedings in the absence of defense counsel with only a minimal risk of reversal. Thus, when an attorney asks to be excused from testimony that seems likely to pertain to the codefendants, the judge is very likely to grant that request if there is little chance that doing so will result in reversal. When an attorney does not show up on time, the judge is very likely to go ahead with a supplemental jury instruction or even begin jury selection if the judge knows that the defendant's likely inability to explain exactly what the attorney could have done if present will be fatal to her claim for a new trial.

The notion that automatic reversal is sometimes required in order to assure compliance with an important constitutional norm is not novel. The Supreme Court has identified several errors that require automatic reversal because, at least in part, prejudice would be difficult to prove and the error would therefore go unchecked without an automatic-reversal rule. In *Waller v. Georgia*,[115] for example, the Court concluded that a violation of the defendant's Sixth Amendment right to a public trial would require automatic reversal. In so concluding, the Court endorsed the view that a "requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'"[116] Similarly, in *Rose v. Mitchell*,[117] the Court held that racial bias in the selection of the grand jury that indicted the defendant required automatic rever-

115. 467 U.S. 39, 49 (1984).

116. *Id.* at 49 n.9 (quoting United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969) (en banc)). The *Waller* court went on to hold that "'[b]ecause demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied.'" *Id.* (quoting State v. Sheppard, 438 A.2d 125, 128 (Conn. 1980)).

117. 443 U.S. 545 (1979).

sal, even though his subsequent conviction by a fair trial jury established that there was, in fact, probable cause to indict him. The Court recognized in *Rose* that a rule of automatic reversal is necessary to combat racial discrimination in grand juries because there are no other effective ways to attack the problem.[118] The Court similarly recognized in *Gray v. Mississippi*[119] that automatic reversal was necessary when a trial judge improperly excluded a juror from a capital trial on the ground that the juror was opposed to capital punishment, when the juror's responses demonstrated that she was, in fact, willing to impose the death penalty. The error in *Gray* certainly could have been considered harmless since the prosecutor apparently would have used a peremptory challenge to remove the juror in question if the judge had not removed her for cause, but the Court concluded that the error required automatic reversal because, in part, "The practical result of adoption of this unexercised peremptory argument would be to insulate jury selection error from meaningful appellate review."[120]

Just as the rule of automatic reversal is sometimes necessary to assure that the grand jury selection process, jury selection at trial, or the closing of the trial to the public does not escape appellate review, the temporary absence of an attorney during a trial should be regarded as structural error as a prophylactic measure. Applying any form of harmless-error analysis to temporary absences of counsel would encourage judges, who are often pressed for time, to conduct certain trial proceedings, particularly supplemental instructions to deliberating juries, without waiting for absent counsel to arrive. So long as the trial proceedings that occur in the absence of counsel appear upon review of the transcript to be routine and proper, an appellate court will almost certainly find the error in conducting those proceedings without counsel to be harmless.

A rule of automatic reversal, however, will strongly discourage judges from either proceeding without waiting for counsel to arrive or allowing defense counsel to leave, just as the rule of automatic reversal strongly discourages judges from closing trials to the public or following improper jury selection methods. Only by applying a rule of automatic reversal can reviewing courts make it unmistakably clear to trial judges and attorneys that such absences will not be tolerated.

Finally, a trial in which defense counsel is absent for a significant period of time is a trial that is, *by its appearances*, so fundamentally flawed that its result should not stand no matter how reliable that result seems to be. Like some of the other structural errors the Court

118. *See id.* at 558 (concluding that civil actions by jurors and pretrial challenges by defendants would be ineffective in preventing racial discrimination in grand jury selection procedures).

119. 481 U.S. 648 (1987).

120. *Id.* at 665.

has recognized, such as the lack of an impartial judge[121] or the use of racially biased jury selection procedures,[122] the absence of counsel also destroys the appearance of a fair trial regardless of how confident a reviewing court might feel about the result. Any trial in which the defense lawyer is absent (or asleep) for a substantial period of time lacks the fundamental appearance of fairness that our system of justice requires. To put it another way, it is not too much to ask that the defendant be given another trial upon a showing that counsel was temporarily absent from a critical stage of the first one. As the Court observed in the context of discriminatory jury selection procedures, such errors "undermine public confidence in the fairness of our system of justice."[123] It is difficult to see how the absence of counsel from critical stages of criminal trials would not similarly undermine the confidence of the public in our system of justice.

V. CONCLUSION

With the recent split of authority, it appears increasingly likely that the Supreme Court will soon have to confront the issue of whether a temporary absence of counsel from a criminal trial is a *Cronic* error.[124] When the Court does consider such a case, one can only hope the Court will be sensitive to the importance to a defendant of having counsel's assistance every step of the way. When a defendant such as Pamela Green or David Hudson is left to fend for herself or himself during a trial, the trial does not pass the test of fundamental fairness, no matter what does, or does not, transpire during the absence. Only by applying the *Cronic* rule of automatic reversal can the Court help prevent such temporary absences from becoming a common feature of American criminal trials.

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121. *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (concluding that defendant has due process right to fair trial before impartial judge "no matter what the evidence was against him").

122. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 100 (1986) (recognizing that "our precedents require that petitioner's conviction be reversed" upon sufficient showing of purposeful discrimination by prosecutor during jury selection).

123. *Id.* at 87.

124. Indeed, it appears that at least one member of the Court has recently staked out a position on the issue. In *Bell v. Quintero*, 125 S. Ct. 2240 (2005) (mem.), Justice Thomas, joined by former Chief Justice Rehnquist, dissented from the denial of certiorari in a case in which the Sixth Circuit had held that trial counsel's failure to object to the participation of biased jurors was *Cronic* error because it amounted to failure to subject the state's case to meaningful adversarial testing. In criticizing the Sixth Circuit's conclusion as contrary to *Bell v. Cone*, 543 U.S. 685 (2002), Justice Thomas characterized three post-*Cone* decisions, including *French v. Jones*, 332 F.3d 430 (6th Cir. 2002), as "questionable applications of our precedent." *Quintero*, 125 S. Ct. at 2243. Unlike *Quintero*, *French* was, of course, a case involving a temporary absence of counsel.